

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

LAVONNE BROCKSCHMIDT,

Plaintiff,

vs.

JO ANNE B. BARNHART, Commissioner  
of Social Security,

Defendant.

No. C01-3033-MWB

**REPORT AND RECOMMENDATION**

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## ***I. INTRODUCTION***

The plaintiff Lavonne K. Brockschmidt (“Brockschmidt”) appeals the decision by an administrative law judge (“ALJ”) denying her Title II disability insurance (“DI”) benefits. Brockschmidt claims she is disabled due to pain in her back, her right shoulder, and limited use of her right upper extremity. Brockschmidt argues the ALJ erred in finding she could return to her past relevant work. She also argues her skills are not transferable to other work, and she is disabled under applicable regulations. (Doc. No. 17)

## ***II. PROCEDURAL AND FACTUAL BACKGROUND***

### ***A. Procedural Background***

Brockschmidt filed an application for DI benefits on May 4, 1998<sup>1</sup>, claiming a disability onset date of April 23, 1998. (R. 82-84) The application was denied initially on March 22, 1999 (R. 62-65), and on reconsideration on June 7, 1999 (R. 68-71) Brockschmidt requested a hearing, which was held on March 2, 2000, in West Des Moines, Iowa, before ALJ Thomas M. Donahue. (R. 27-59) Attorney Kelley Rice represented Brockschmidt at the hearing. Brockschmidt and Vocational Expert (“VE”) Carma A. Mitchell testified at the hearing. On July 26, 2000, the ALJ issued his opinion denying Brockschmidt’s claim for benefits. (R. 9-18) The Appeals Council of the Social Security Administration denied Brockschmidt’s request for review on February 13, 2001 (R. 5-6), making the ALJ’s decision the final decision of the Commissioner.

Brockschmidt filed a timely Complaint in this court on March 20, 2001, seeking judicial review of the Commissioner’s ruling. (Doc. No. 1) The Commissioner moved for sentence six remand, citing loss of the claim file. (Doc. No. 6) The motion was granted on October 12, 2001 (Doc. No. 8). Shortly thereafter, the claim file was located and the

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<sup>1</sup>She protectively filed her claim on April 20, 1998. (R. 80)

Commissioner answered the complaint. (Doc. No. 9) Pursuant to Administrative Order #1447, entered September 20, 1999, by Chief Judge Mark W. Bennett, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Brockschmidt's claim. Brockschmidt filed a brief in support of her appeal on February 11, 2002 (Doc. No. 17). On March 26, 2002, the Commissioner of Social Security filed a responsive brief (Doc. No. 20). Brockschmidt did not file a reply brief. The court now deems the matter fully submitted, and pursuant to 42 U.S.C. § 405(g), turns to a review of Brockschmidt's claim for benefits.

### ***B. Factual Background***

#### ***1. Introductory facts and Brockschmidt's daily activities***

##### ***a. Hearing testimony***

At the time of the hearing, Brockschmidt was 58 years old and 5'3" tall. (R. 29-30) She weighed 216 pounds, which she stated was "kind of heavy because I can't move around a lot . . . I can't go walking and get rid of it." (R. 30) She had gained thirty pounds during the previous year. (*Id.*) Brockschmidt lives in Lorville, Iowa, with her husband, two ducks, three geese, a dog, five cats, and a goat. (R. 29, 31)

Brockschmidt graduated from high school in 1959, and had two years of nurse's training at St. Anthony's Nursing Care. She received on-the-job training and became an obstetrical technician, working at a hospital in Boonsberg for eight years. She last worked as an obstetrical technician in 1978. (R. 31)

Brockschmidt has no difficulty reading or understanding what she reads. Brockschmidt is right-handed. She has problems writing because she "can't hold [her] arm up there on the desk long enough." (*Id.*)

Brockschmidt said she could work "if there was a job that was created that I could do . . . where I could sit and, and move around when I needed to. . . ." (R. 31-32) Brockschmidt

said her doctor told her not to lift over three pounds with her right hand. (R. 46) Brockschmidt has problems with her right hand, arm and shoulder. (R. 32) In addition, Brockschmidt broke her back in 1990 or 1991, after which a doctor told her to apply for disability “because I was never going to be able to do the type of job I was doing or a lot of other jobs.” (*Id.*)

At the time of the hearing, Brockschmidt was working “for the government Green Thumb program. It’s funded through the Farmers’ Labor Union.” The program is for persons 55 years of age and older. She works three days a week, which is the maximum amount of time funded by the grant. (*Id.*) Brockschmidt described her job as follows:

I drive to an office – an unemployment office, and I am there for two hours. My name is in the paper that I’ll be there for walk-ins. For older people that want to get – are seeking some kind of employment or want to go back to school and get more education. Something like that.

(R. 33) She assists older persons in accessing educational resources and communicating with employers looking for workers. (*Id.*) Her job covers four different counties, so it involves some driving. (R. 34)

She stated further, “And I go to the employers and offer to pay this person’s wages while they are being trained for the job and then they must sign a contract that they’ll pick them up and hire them for at least three months longer.” (R. 33) Brockschmidt typically works Tuesday, Wednesday and Thursday, from 8:00 a.m. to 4:30 p.m., with a half hour lunch break. She makes \$7.00 an hour (R. 33, 34), and is reimbursed for her mileage. (R. 51) Her job is based on a grant, and if the grant is not renewed each year, then she will no longer have a job. (R. 50-51) Her job also involves some lifting. She has files that she takes with her, and she carries the files “in different bags” so she can carry them with her left arm. (R. 36) She lifts around 20 pounds with her left arm. (R. 36-37) Her doctor told her that if she is not careful, she might need a shoulder replacement. (R. 37)

Brockschmidt was off work for about eight weeks due to a bleeding ulcer. (R. 34) She sometimes leaves work early due to pain in her shoulder or back. (R. 35) A doctor in Iowa City told her that when she is sitting at work or driving, she should stop every 45 minutes to get up and walk around to prevent blood clots. (*Id.*) Getting up and walking around also helps the pain in her back. (R. 36)

Before she started working for the Green Thumb program, Brockschmidt worked for three years at Harvest Acres, Incorporated, a drug and alcohol treatment center for children located in Rockwell City. (The center is now closed.) (R. 37) During the third year, she worked full-time. At that job, she performed different duties depending on which shift she was working. When she worked the night shift, she did all the laundry for 22 children. She would carry two bags of laundry at a time, and she would lift 30 to 40 pounds. (R. 37-38) She also “[m]onitored the children at night so that they didn’t get up and hurt anybody.” (R. 38) She did some paperwork, and sometimes took the children outside or to a concert. (*Id.*)

If the Harvest Acres job were still available, Brockschmidt did not believe she could return to that job because she would be unable to lift the files and the laundry. The files for each child weighed around 30 pounds. In addition, there were four flights of stairs in the building and no elevators, and she had to walk up the stairs and back down again every half hour. (*Id.*)

Prior to Harvest Acres, Brockschmidt worked at Wal-Mart in Fort Dodge, from about 1991 to 1996. She was an assistant to the supervisor of the housewares department. She worked full-time for the last six months before she got hurt. She left when she hurt her back, and she returned nine months later, working as a checker. (R. 38-39) When she worked in the housewares department, Brockschmidt lifted up to fifty pounds. She also had to do lifting as a checker – “a lot of lifting of cat food, dog food, and microwave ovens[.]” (R. 39)

Brockschmidt described how she broke her back on the job at Wal-Mart. She stated, “A microwave fell off the top shelf on my back. I was down on my hands and knees cleaning

a shelf and some – it was around Christmas time. Somebody climbed up and knocked a microwave oven off.” (*Id.*) She was off work from April or May until December. (*Id.*) When she returned to work, the company gave her what they considered to be a light-duty job as a checker. However, Brockschmidt was unable to handle the job, which required her to stand for four hours without a break. The prolonged standing caused her back to hurt and she “had to go back on pain pills again.” (R. 39-40)

Brockschmidt was injured again in April of 1998, while she was working for Green Thumb, when she fell against an open car door and injured her shoulder. (R. 40-41) She described the treatment she received as follows:

I just went to outpatient and they put a brace on it. And then the next day the doctor called me and said I needed to go see a specialist. And I went to an orthopedic specialist in Fort Dodge and he said, yeah, the bone was broken, the treatment they had did was fine, just keep it in that sling for, for three weeks and come back and see him. And I went back and the bone had healed but the pain didn’t go away.

(R. 41) She subsequently had two surgeries on her shoulder, in June and September of 1998, after which she had physical therapy. (*Id.*)

Brockschmidt stated she has limited use of her right arm and shoulder. She cannot lift her right arm up to her head. She usually eats with her left hand. If she eats with her right hand, she has to brace her arm on the table. (*Id.*) She is able to put earrings on, but she does not wash her own hair; she goes to a beauty shop once a week. (R. 42) Her pain stretches down the back side of her right arm to her elbow and then down into her hand. She usually does not have pain from the shoulder up towards her neck. (*Id.*) She stated the pain is present all the time, but it is worse sometimes more than others. For example, on the days she drives, the pain is worse, or if she has to write out a long application, she will have to take pain medication in the afternoon. (*Id.*)

Brockschmidt said her sleep is disturbed by the pain in her shoulder, arm, and/or back. She usually sleeps about two hours before she has to get up and walk around for awhile. She is a very light sleeper and anything can wake her up (for instance, a dog barking), but usually the pain and headaches wake her up. (R. 43)

Brockschmidt suffered another injury to her right shoulder on December 4, 1999, when a deer jumped through her car window and its legs hit her in the shoulder. She was in the hospital for about seven hours, where she received anti-inflammatory shots. She does not believe the injury made her shoulder worse, but stated the pain is more noticeable since the injury. (R. 43-44) Brockschmidt was hospitalized again for ten days beginning December 24, 1999, when she got the flu and it went into pneumonia. (R. 43)

Brockschmidt had a car accident in 1983, in which she broke her left ankle. She had three surgeries on her ankle, and a steel pin and some screws were put in the ankle. The hardware is still in her ankle today. (R. 44) She said she is unable to walk or stand for long periods of time, and her leg “swells in the summertime.” (*Id.*)

At the time of the hearing, Brockschmidt was taking Naproxen<sup>2</sup> for cellulitis, which she described as “an infection of the skin and nerves in my face.” (R. 45) The medication makes her nauseous. She also takes Ultram “for the infection in my nerves,” although she does not take Ultram if she will be driving. (*Id.*) She takes Tylenol Arthritis every four hours on a regular basis, for pain. (R. 46)

Brockschmidt feels she can stand in one spot for five or ten minutes without walking around, but then she will have sufficient pain or discomfort that she will have to change positions. She has a pinched nerve in her back, and her left leg “will start to go to sleep.” She can walk comfortably for about a block before she begins having pain in her back and her arm. (*Id.*) The pain will start in her back and radiate down the sciatic nerve into her left leg. This

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<sup>2</sup>Brockschmidt described Naproxen as an antibiotic. It actually is a nonsteroidal anti-inflammatory agent. See, e.g., Naprosyn, *Physicians' Desk Reference*, 2110-11 (50th ed. 1996).

happens each time she walks a block or more, and also when she sits in a car for a long period of time. (R. 47) If she is sitting in a comfortable chair on a flat surface, then she can sit for an hour-and-a-half to two hours without having to get up and move. (*Id.*)

Brockschmidt stated the problem with her right hand affects her daily activities and her ability to work. She explained, “When I first came back to work, I would have to put the clipboard with the application in my lap to do it. Most of the places I go to now, they have the chairs that I can pull up comfortably at the table.” (R. 47-48) She rests her right arm on the table to write. (*Id.*)

As far as doing household chores, Brockschmidt’s husband does most of the cooking because Brockschmidt is unable to stir anything. Brockschmidt can vacuum with her left hand. She has a cleaning lady who comes in every other week. She stated she and her husband recently remodeled their house to make it easier to keep clean and easier for her to do laundry. They put in new carpeting and a new furnace and windows to cut down on the dust, and they moved the washer and dryer upstairs into the kitchen. (R. 48-49) She carries a few items at a time from the bathroom out to the kitchen, in one hand, to do laundry. (R. 49)

Brockschmidt explained how her injuries have affected her ability to enjoy hobbies. She used to do a lot of sewing, and used to teach knitting and crochet classes. She is unable to do those activities because of her arm. She and her husband have a large truck garden, and Brockschmidt used to do a lot of canning for her four children, but now she is unable to screw on the lids. (*Id.*)

Brockschmidt stated she did not believe she could work at her current job for eight hours a day, five days a week, on a consistent basis. She said, “I think that would be too much. I’d be behind the wheel of a car too much. Because four hours a day is quite a bit now that I have to take something when I get home at night.” (*Id.*) When Brockschmidt gets home from work, she stated, “I am lucky to get my clothes changed then go sit down somewhere[.]” because she is so tired and in pain. (R. 50)



In response to questions from the VE, Brockschmidt clarified some of her work experience. She worked as a sales representative for a photography studio from 1982 to 1990. After photos were taken, Brockschmidt would sit down with people, go through their proofs, and process their order. (R. 53-54) The job was before she broke her back or had the shoulder injuries. The job required her to lift boxes of negatives, weighing possibly three or four pounds. She sat most of the time on the job. (R. 54)

Brockschmidt also clarified her duties as a medication aide in the residential treatment program for young people. She dispensed medications at night before the residents went to bed. (R. 55)

***B. Other evidence***

On June 15, 1998, Brockschmidt completed a Personal Pain/Fatigue Questionnaire for the Iowa Disability Determination Services Bureau. (R. 133-36) At that time, Brockschmidt stated she had aching pain and muscle spasms in her back, radiating down into her legs. She had sharp, stabbing, tearing pain in her arm that radiated down into her hand and fingers. The pain was constant, and was worse at night. Movement, cold weather, riding, sitting, standing, or walking for any period of time made her pain worse. (R. 133)

Brockschmidt stated her pain had worsened in the previous year. She was taking Darvocet, which was not helping; Tylenol, which provided some relief; Hydrocodone, which relieved the pain but made her sleepy; and Morphine at night. (R. 134) She also tried hot baths and daily exercise, but these were not relieving her pain. (*Id.*) Brockschmidt indicated her pain medications caused the “sharpness to go away,” but she only slept for two hours per night. She needed help getting dressed, and she wore loose clothing and no bra. She was unable to lift at all. (R. 135)

Brockschmidt said she could walk three to four blocks a day, but after that, she had to sit down for most of the day. (R. 134) She could stand for 15 to 20 minutes, and sit for 10 to

15 minutes. (R. 136) Activities she had restricted or stopped due to pain included driving and riding in a car, housework, lifting, and shopping. (R. 134) She also could not do crossword puzzles, because her medications affected her ability to concentrate and think. (R. 135)

At the time she completed the questionnaire, her arm was broken and she was not engaging in any routine activities.<sup>3</sup> (R. 136)

Brockschmidt completed a new Personal Pain/Fatigue Questionnaire on April 8, 1999. (R. 155-57) At that time, she complained of lower back pain, which was a dull ache that sometimes would become a sharp pain. She also complained of a stabbing pain in her right shoulder. She said, “If [I] do a lot of driving or use [the arm] excessively there is a stinging like bees are stinging.” (R. 155) Brockschmidt experiences pain “25 to 30 times per day,” and the pain lasts five to ten minutes each time. The pain is worse in the afternoon and evening. Driving or riding in a car for long periods of time and excessive writing make her pain worse. (*Id.*)

Brockschmidt takes Percocet, Darvocet, and Tylenol with codeine, all of which make her sleepy. She takes medication every four hours. She also uses ice packs to help the swelling. (R. 156) She noted she has a 15-month-old grandchild she has been unable to pick up or hold. She is unable to fix her hair and put on jewelry without assistance. She also requires assistance getting out of the bathtub. She cannot eat with her right arm because she has no strength in it. She is no longer able to bowl, vacuum, cook, or do dishes, and it is hard for her to write, type, or use a desktop computer (she uses a laptop, holding it in her lap). (*Id.*) She is restricted to lifting no more than five pounds. She used to do a lot of hand work (crafts, etc.), but she is no longer able to engage in those activities. (R. 157) Brockschmidt said she does not sleep well, waking up every couple of hours. (*Id.*)

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<sup>3</sup>The discrepancies between Brockschmidt’s responses on this first pain questionnaire and her testimony at the hearing likely are attributable to the time lapse between completion of the questionnaire on June 15, 1998, and the time of the hearing on March 2, 2000. Her level of activity obviously had increased by the time of the hearing.

## 2. *Vocational expert's testimony*

VE Carma Mitchell testified at the hearing. The ALJ asked the VE the following hypothetical question, considering a 58-year-old female with a twelfth grade education and two years of nursing training, and Brockschmidt's past relevant work history:

Claimant can lift up to 20 lbs., but that's only with the left hand. With the right hand she can lift only 3. She can sit up to two hours at a time for a total of six in an eight-hour day. She can stand up to 20 minutes at a time for a total of at least two of an eight-hour day. She can walk one block. She can never climb ladders, ropes and scaffolds. She can only have occasional climbing of ramps and stairs. Only occasional balancing, stooping, kneeling, crouching, crawling and bending. She has essentially no useful function of her right arm, except for a little bit of writing and other limited activities which can be done within ten inches of her mid-abdomen. Based on this hypothetical, could the claimant do any of her past relevant work?

(R. 55-56) In addition, the individual could write for ten to fifteen minutes at a time. (R. 56)

The VE responded that given those limitations, she felt Brockschmidt "could do the sales rep general position as she did it. Not necessarily as per the national economy." (*Id.*) She felt Brockschmidt's other past relevant work would be excluded. (*Id.*) When asked if Brockschmidt would have any transferable skills, the VE noted:

The only thing would be like communications skills. Giving and receiving information would transfer to jobs like an information clerk. DOT No. 237.367-022, which would [be] semi-skilled and sedentary. In the state of Iowa there would be approximately 1,173 positions. In the nation, approximately 105,000. And I feel with the limitation regarding use of the hand, that that's the only job that the acquired skills would transfer to.

(R. 57) In other words, Brockschmidt could perform light or less-than-light work. (*Id.*) The ALJ asked how transferable Brockschmidt's skills would be for an information clerk, and the VE responded:

I don't feel they would be heavily marketable or – it would be some variation as far as you know the type of business. I, I guess it wouldn't be highly transferable in that she would have to learn the basic procedures of that vocation, as far as giving out information.

(R. 57-58)

If the claimant was unable to complete a normal 40-hour workweek, then, the VE stated, the claimant would be unable to return to her past relevant work, or transfer her skills to any other type of job. (R. 58)

### **3. *Brockschmidt's medical history***

A detailed chronology of Brockschmidt's relevant medical history is attached to this opinion as Appendix A. To summarize, Brockschmidt first sought treatment for pain in her lower back and left leg in September 1992. A single medical record from that date indicates Brockschmidt had an MRI of her lumbar spine which showed a bulging disk with some nerve impingement, and some degenerative changes in two disk spaces. (R. 175) The medical records submitted in this case contain no other evidence that Brockschmidt ever sought treatment for her back or leg problems.

Brockschmidt's significant medical history relates to her right shoulder. She had undergone rotator cuff repair in 1986, and by her report, she had been doing well until the new injury. Brockschmidt injured her right shoulder when she was getting into a car, and she began to experience pain in her shoulder. X-rays indicated degenerative osteoarthritis of the acromioclavicular and glenohumeral joints, and also indicated chronic peritendinitis. (R. 177-79) An MRI performed on May 26, 1998, revealed a complete rotator cuff tear on the right. (R. 182) Dr. Samir Wahby performed surgery to repair Brockschmidt's torn right rotator cuff on June 2, 1998. (R. 188) Brockschmidt did well postoperatively, had no complications, and was discharged with instructions on range of motion exercises. (R. 184) Brockschmidt began

physical therapy, but the recommended exercises caused her too much pain and she quit going after two visits. (R. 196, 182) Dr. Wahby concurred with Brockschmidt's decision not to attend physical therapy, and he told her to continue doing her home exercises twice a day and to avoid strenuous exercising. (R. 182) Brockschmidt continued to have pain and discomfort in her shoulder, and was taking pain medications including Talwin. (R. 182-83)

Brockschmidt stopped seeing Dr. Wahby after her July 17, 1998, visit, and on August 17, 1998, she began seeing Jeffrey P. Davick, M.D., of Des Moines Orthopaedic Surgeons, P.C. Brockschmidt told Dr. Davick her shoulder had not been much better since the surgery. Her pain had gotten worse than it had been immediately following surgery, and she feared she had reinjured her shoulder. Dr. Davick ordered an arthrogram, which showed a complete, large tear of the right rotator cuff. (R. 208-09) Dr. Davick performed surgery to repair the right rotator cuff tear on September 10, 1998. (R. 208)

After the September 1998 surgery, Brockschmidt began to improve, and her pain decreased over the next several months. (*See* R. 201-208) Dr. Davick placed Brockschmidt on work restrictions, including no lifting over five pounds and no work above chest height. He limited her to 20 hours per week to allow time for her physical therapy and exercises. (R. 202-06) As of March 29, 1999, Dr. Davick felt Brockschmidt had achieved maximum medical improvement with regard to her shoulder. (R. 199-200) He noted Brockschmidt's range of motion was "surprisingly good," and she essentially was "working without restrictions with regard to her shoulder." (R. 199-200)

A consulting physician, Dr. E.D. DeHaan, examined Brockschmidt on January 20, 1999, and noted her prognosis for substantial recovery was not good. He noted Brockschmidt is right-handed, and has "basically a minimally functional right arm and takes Darvocet and Flexeril daily." He opined Brockschmidt might improve over time to the point that she could write or even do some keyboard work, but she still would be limited to light tasks in front of her body and not above chest height. (R. 211-15)

Dennis A. Weis, M.D., performed a Residual Physical Functional Capacity Assessment of Brockschmidt on March 4, 1999. (R. 217-24) He found Brockschmidt could occasionally lift and/or carry up to 20 pounds, frequently lift and/or carry up to 10 pounds, stand and/or walk about six hours in an eight-hour workday, and sit, with normal breaks, for a total of about six hours in an eight-hour workday. He found Brockschmidt would be limited in pushing and/or pulling on her right side above the waist level. Brockschmidt should never climb a ladder, rope, or scaffolds, and should never crawl. She would have occasional limitations in balancing, stooping, kneeling, and crouching. She would have limited ability to reach overhead with her right arm, and should avoid work above the chest level with that arm. Otherwise, Dr. Weis found Brockschmidt did not have any manipulative, visual, communicative, or environmental limitations.

Dr. Weis noted some inconsistencies between Brockschmidt's subjective pain complaints and the medical evidence, stating:

There are some inconsistencies which erode claimant's credibility. Most specifically that she had significant ongoing impairment related to back problems. Current range of motion and exams related to the back are normal. Further, she has normal function and use of the left upper extremity. She has reduced range of motion and an anatomic reason for symptoms of pain in the right shoulder, however, maintains good hand function. There is no evidence of impaired sensation in the right upper extremity. These inconsistencies erode claimant's credibility to a degree. Treating source recommends only 5 pounds lifting and no use above the chest. However, does not give consideration to the normal left upper extremity. For this reason, controlling weight is not given. Current examining source feels that she would be capable of no more than moderate lifting and carrying or prolonged sitting or standing or lifting above a certain level. All recommendations consistent with RFC as developed.

(R. 215-16)

#### 4. *The ALJ's conclusion*

The ALJ found Brockschmidt has “an impairment or a combination of impairments considered ‘severe’ based on the requirements in the Regulations . . . [but] [t]hese medically determinable impairments do not meet or medically equal one of the listed impairments in [the Regulations].” (R. 17, ¶¶ 3 & 4) He found Brockschmidt has not engaged in substantial gainful activity since the onset of her disability. (*Id.*, ¶ 2) He noted Brockschmidt “works only 20 hours per week and earns \$6.00 per hour,” which the ALJ found not to constitute substantial gainful activity. (R. 13)

The ALJ found Brockschmidt’s “subjective complaints to be not fully credible and her symptoms to be not as limiting as alleged.” (R. 15) As support for his conclusion, the ALJ noted Brockschmidt had not sought any treatment for her right shoulder for almost a year, since March 29, 1999. (*Id.*) Similarly, Brockschmidt had not sought any treatment for her back or leg problems since her alleged disability onset date of April 23, 1998. (R. 16) “Lack of treatment is inconsistent with allegations of disabling pain. Moreover, her treating doctor, Dr. Davick, stated that there were no restrictions in the number of hours she could work on February 15, 1999, and on March 29, 1999, he stated that she was working without restrictions.” (R. 15) The ALJ also noted that although Brockschmidt “testified that she has problems writing, Dr. DeHaan found that her grip strength was normal on January 20, 1999.” (R. 16) The ALJ found the fact that Brockschmidt was able to work 20 hours a week, with the activities involved in her job, to be “inconsistent with her allegations of extreme limitations in her ability to function.” (*Id.*) In conclusion, the ALJ noted:

The medical opinions and notes throughout the record weigh heavily against the claimant’s allegations of disability. While the undersigned does not doubt the claimant has pain, the allegations of symptom levels that preclude all types of work are not consistent with the evidence as a whole and are not credible. None of the physicians involved in the claimant’s treatment have offered an opinion that the claimant is disabled or made any statement or

recommendation that she would be unable to work at a substantial gainful level for a continuous period of at least 12 months.

(*Id.*)

The ALJ found Brockschmidt's medically determinable disorders of the back and shoulder did not prevent her from performing her past relevant work as a sales representative, or from working as a sedentary information clerk. (R. 18, ¶¶ 5, 8 & 9) He found Brockschmidt "has the physical capabilities to perform a limited range of light work." He held Brockschmidt

is capable of lifting and carrying 20 pounds with her left hand and 3 pounds with her right hand; she can sit 2 hours at a time for a total of 6 hours during an 8 hour day (with normal breaks); she can stand 20 minutes at a time for a total of 2 hours during an 8 hour day (with normal breaks); she can walk 1 block at a time; she can occasionally climb ramps and stairs, balance, stoop, kneel, crouch, crawl, and bend but never climb ladders, ropes, or scaffolds; she should not perform any lifting with her right hand or work with her right arm above shoulder level; and she can perform only a small amount of writing and other limited activities with her right upper extremity but these activities must be able to be performed within 10 inches of her mid-abdomen.

(R. 18, ¶ 7)

The ALJ concluded Brockschmidt was not under a disability at any time through the date of his decision. (R. 18)

### ***III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD***

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do



his previous work but cannot, considering . . . his age, education and work experience, engage in any other kind of substantial gainful work which exists in [significant numbers in] the national economy . . . either in the region in which such individual lives or in several regions of the country.” 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *see Kelley*, 133 F.3d at 587-88 (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity. Second, he looks to see whether the claimant labors under a severe impairment; *i.e.*, “one that significantly limits the claimant’s physical or mental ability to perform basic work activities.” *Kelley*, 133 F.3d at 587-88. Third, if the claimant does have such an impairment, then the Commissioner must decide whether this impairment meets or equals one of the presumptively disabling impairments listed in the regulations. If the impairment does qualify as a presumptively disabling one, then the claimant is considered disabled, regardless of age, education, or work experience. Fourth, the Commissioner must examine whether the claimant retains the residual functional capacity to perform past relevant work.

Finally, if the claimant demonstrates the inability to perform past relevant work, then the burden shifts to the Commissioner to prove there are other jobs in the national economy that the claimant can perform, given the claimant’s impairments and vocational factors such as age, education and work experience. *Id.*; *Hunt v. Heckler*, 748 F.2d 478, 479-80 (8th Cir. 1984) (“[O]nce the claimant has shown a disability that prevents him from returning to his previous line of work, the burden shifts to the ALJ to show that there is other work in the national economy that he could perform.”) (citing *Baugus v. Secretary of Health & Human Serv.*, 717 F.2d 443, 445-46 (8th Cir. 1983); *Nettles v. Schweiker*, 714 F.2d 833, 835-36 (8th Cir. 1983); *O’Leary v. Schweiker*, 710 F.2d 1334, 1337 (8th Cir. 1983)).

Step five requires that the Commissioner bear the burden on two particular matters:

In our circuit it is well settled law that once a claimant demonstrates that he or she is unable to do past relevant work, the burden of proof shifts to the Commissioner to prove, first that the claimant retains the residual functional capacity to do other kinds of work, and, second that other work exists in substantial numbers in the national economy that the claimant is able to do. *McCoy v. Schweiker*, 683 F.2d 1138, 1146-47 (8th Cir. 1982) (*en banc*); *O'Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983).

*Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000) (emphasis added) *accord Weiler*, 179 F.3d at 1110 (analyzing the fifth-step determination in terms of (1) whether there was sufficient medical evidence to support the ALJ's residual functional capacity determination and (2) whether there was sufficient evidence to support the ALJ's conclusion that there were a significant number of jobs in the economy that the claimant could perform with that residual functional capacity); *Fenton v. Apfel*, 149 F.3d 907, 910 (8th Cir. 1998) (describing "the Secretary's two-fold burden" at step five to be, first, to prove the claimant has the residual functional capacity to do other kinds of work, and second, to demonstrate that jobs are available in the national economy that are realistically suited to the claimant's qualifications and capabilities).

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ's findings if they are supported by substantial evidence in the record as a whole. *Weiler v. Apfel*, 179 F.3d 1107, 1109 (8th Cir. 1999) (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . ."). Under this standard, substantial evidence means something "less than a preponderance" of the evidence, *Kelley*, 133 F.3d at 587, but "more than a mere scintilla," *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971); *accord Ellison v. Sullivan*, 921

F.2d 816, 818 (8th Cir. 1990). Substantial evidence is “relevant evidence which a reasonable mind would accept as adequate to support the [ALJ’s] conclusion.” *Weiler*, 179 F.3d at 1109 (again citing *Pierce*, 173 F.3d at 706); *Perales*, 402 U.S. at 401, 91 S. Ct. at 1427; *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993); *Ellison*, 91 F.2d at 818.

Moreover, substantial evidence “on the record as a whole” requires consideration of the record in its entirety, taking into account ““whatever in the record fairly detracts from”” the weight of the ALJ’s decision. *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *accord Gowell, supra*; *Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213). Thus, the review must be “more than an examination of the record for the existence of substantial evidence in support of the Commissioner’s decision”; it must “also take into account whatever in the record fairly detracts from the decision.” *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Gavin v. Heckler*, 811 F.2d 1195, 1199 (8th Cir. 1987)). The court, however, does “not reweigh the evidence or review the factual record *de novo*.” *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (quoting *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it “possible to draw two inconsistent positions from the evidence and one of those positions represents the agency’s findings, [the court] must affirm the [Commissioner’s] decision.” *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992) (citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *see Hall v. Chater*, 109 F.3d 1255, 1258 (8th Cir. 1997) (citing *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996)). This is true even in cases where the court “might have

weighed the evidence differently,” *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)), because the court may not reverse “the Commissioner’s decision merely because of the existence of substantial evidence supporting a different outcome.” *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997); accord *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001); *Gowell*, *supra*.

On the issue of an ALJ’s determination that a claimant’s subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ’s credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant’s subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). Under *Polaski*:

The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant’s prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

- 1) the claimant’s daily activities;
- 2) the duration, frequency and intensity of the pain;
- 3) precipitating and aggravating factors;
- 4) dosage, effectiveness and side effects of medication;
- 5) functional restrictions.

*Polaski*, 739 F.2d at 1322.

#### ***IV. ANALYSIS***

As noted above, Brockschmidt argues the ALJ erred in finding she is able to return to her past relevant work. She also argues her skills are not transferable to other work, and she is disabled under applicable regulations. (Doc. No. 17) Brockschmidt concedes that if she is able to return to her past relevant work, then the burden does not shift to the Commissioner to show other work Brockschmidt can perform. (Doc. No. 17, p. 12; citations omitted). Thus, the first question before the court involves step four in the sequential evaluation process; that is, whether the ALJ erred in finding Brockschmidt has the residual functional capacity to return to her past relevant work.

As noted previously, the ALJ found Brockschmidt's "past relevant work as a sales representative, *as she performed it*, did not require the performance of work-related activities precluded by her residual functional capacity[.]" (Citation omitted.) (R. 18, ¶ 8; emphasis added) Brockschmidt argues she would be unable to perform her past relevant work as a sales associate, even considering the manner in which she performed it, because the job involved extensive driving throughout 17 states. She claims her physical limitations and the side effects of her medications would prevent her from driving long distances. She also points to the VE's testimony that Brockschmidt could not necessarily perform the sales job "as per the national economy." (R. 56) Finally, Brockschmidt argues there is little likelihood she could actually find similar employment given her physical limitations and the side effects of her medications. (R. 17, pp. 10-11)

In response, the Commissioner claims Brockschmidt testified her current part-time job requires her to drive four hours a day, with a rest stop every 45 minutes. (Doc. No. 20, p. 15, citing R. 35-36) The Commissioner argues "[t]his supports the ALJ's conclusion that Plaintiff's impairments did not preclude her from work that would involve several hours of driving each day." (Doc. No. 20, p. 16)

The Commissioner misstates the record. As the ALJ noted, “The claimant testified that her job involves driving 2 hours a day, interviewing prospective clients and employers for 2 1/2 hours, visiting employment sites, and carrying 20 pounds of folders with her left arm.” (R. 16; *see* R. 35-36) Thus, the *total* amount of time Brockschmidt spends daily in both *driving and sitting* equals four hours. It seems unlikely, given her physical limitations and the side effects of her medications, that Brockschmidt could work in a job that required her to drive extensively throughout a 17 state area, as she did in her past relevant work as a sales associate.

A claimant will be found to be not disabled if she retains the residual functional capacity to perform:

- “1. The actual functional demands and job duties of a particular past relevant job; or
2. The functional demands and job duties of the occupation as generally required by employers throughout the national economy.”

Social Security Ruling [ ] 82-61.

*Jones v. Chater*, 86 F.3d 823, 826 (8th Cir. 1996). The record does not contain substantial evidence to support the ALJ’s conclusion that Brockschmidt is able to perform “the actual functional demands and job duties” of her past relevant work as a sales associate, given the extensive driving the job required. Further, the VE opined Brockschmidt could not perform the sales associate job as per the national economy, and Brockschmidt’s skills would not be heavily marketable or highly transferable to other work. As a result, Brockschmidt is disabled, and the Commissioner’s decision should be reversed.

## ***V. CONCLUSION***

Having found Brockschmidt is entitled to benefits, the court may affirm, modify or reverse the Commissioner’s decision with or without remand to the Commissioner for rehearing. 42 U.S.C. § 405(g). In this case, where the record itself “convincingly establishes

disability and further hearings would merely delay receipt of benefits, an immediate order granting benefits without remand is appropriate.” *Cline*, 939 F.2d at 569 (citing *Jefferey v. Secretary of H.H.S.*, 849 F.2d 1129, 1133 (8th Cir. 1988); *Beeler v. Bowen*, 833 F.2d 124, 127-28 (8th Cir. 1987)); accord *Thomas v. Apfel*, 22 F. Supp. 2d 996, 999 (S.D. Iowa 1998) (where claimant is unable to do any work in the national economy, remand to take additional evidence would only delay receipt of benefits to which claimant is entitled, warranting reversal with award of benefits). Consequently, it is recommended that the court reverse the ALJ’s decision and remand this case to the Commissioner for an award of benefits in the appropriate amount.

**IT IS RECOMMENDED**, unless any party files objections<sup>4</sup> to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that judgment be entered in favor of Brockschmidt<sup>5</sup> and against the Commissioner, and that this case be **reversed and remanded** to the Commissioner for the calculation and award of benefits.

**IT IS SO ORDERED.**

**DATED** this 16th day of April, 2002.

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PAUL A. ZOSS  
MAGISTRATE JUDGE

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<sup>4</sup>Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

<sup>5</sup>If final judgment is entered for the plaintiff, the plaintiff’s counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.

UNITED STATES DISTRICT COURT